



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 23, 2022

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BOARD DECISIONS

Appellant: Jason Hemann

Agency: Department of Veterans Affairs

Decision Number: [2022 MSPB 46](#)

Docket Number: CH-0714-21-0067-I-1

Issuance Date: December 20, 2022

VA Accountability Act

Timeliness, Equitable Tolling

The agency removed the appellant under the authority of 38 U.S.C. § 714 based on a charge of inappropriate conduct. In pertinent part, 38 U.S.C. § 714(c)(4)(B) requires Board appeals of removal actions taken pursuant to section 714 to be filed with the Board “[no] later than 10 business days” after the effective date of the removal. Here, however, the agency’s decision notice informed the appellant that he could file his appeal “at any time” after he received the decision notice, “but not later than 30 calendar days after the separation ha[d] been effected, or 30 calendar days after the date of [his] receipt of [the] decision, whichever [was] later.” The appellant filed his Board appeal within the timeframe set forth in the agency’s decision notice, but more than 10 business days after the effective date of his removal. The administrative judge issued an initial decision, concluding that the appeal was

untimely under 38 U.S.C. § 714(c)(4)(B), and that there was no basis for equitable tolling. In so finding, the administrative judge reasoned that the agency's inclusion of erroneous appeal rights was an "inadvertent mistake," and there was no indication that the mistake was "intentional or rose to the level of affirmative misconduct." The appellant filed a petition for review, arguing that the 10-day filing deadline should be equitably tolled because it was reasonable for him to have relied on the appeal rights provided to him by the agency.

Holding: Given the circumstances, it was appropriate to equitably toll the 10-day statutory filing deadline.

The Board has set forth three scenarios under which it will waive a filing deadline prescribed by statute or regulation: (1) the statute or regulation itself specifies circumstances in which the time limit will be waived; (2) an agency's affirmative misconduct precludes it from enforcing an otherwise applicable deadline under the doctrine of equitable estoppel, unless the application of equitable estoppel would result in the expenditure of appropriated funds in contravention of statute; and (3) an agency's failure to provide a mandatory notice of election rights warrants the waiver of the time limit for making the election. Also, the doctrine of equitable tolling may be available under certain circumstances to toll a statutory deadline in an untimely filed appeal.

In *Ledbetter v. Department of Veterans Affairs*, 2022 MSPB 41, the Board concluded that scenarios (1) and (3) were inapplicable to appeals of actions taken under section 714. However, the Board reasoned in *Ledbetter* that the deadline set forth in section 714 could be subject to equitable estoppel or equitable tolling, and it was inclined to believe that equitable tolling was available in appeals of actions taken under section 714 under appropriate circumstances. Because the requirements to establish equitable tolling are less stringent than the requirements to establish equitable estoppel, the Board considered whether the appellant met his burden of establishing that equitable tolling was warranted.

The Board noted that, in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the U.S. Supreme Court held that there is a rebuttable presumption that equitable tolling can be invoked in certain circumstances to excuse an untimely filed lawsuit against the Government; such circumstances include situations wherein an appellant "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." The Board reasoned that the administrative judge did not cite any legal authority to support the proposition that maliciousness or ill intent was required to invoke equitable tolling based on a claim that a party was "induced or tricked by his

adversary's misconduct into allowing the filing deadline to pass." The Board explained that the limited relevant jurisprudence on the issue was, at a minimum, silent on the issue of motive. Indeed, the Board was unable to identify any cases indicating that a party's misconduct or misleading language must be committed or provided with maliciousness or ill intent in order to trigger equitable tolling. Instead, the case law suggests that when a party takes an action or provides language that misleads an adversary, that party will not benefit from that action.

Because the agency's decision letter misled the appellant into believing that a 30-day filing period was permitted, the Board concluded that the agency had "induced or tricked" him into allowing the statutory 10-day filing deadline to pass. Accordingly, the Board found that the circumstances warranted equitable tolling of the filing deadline.

COURT DECISIONS

NONPRECEDENTIAL:

Obot v. Department of Defense, No. [2022-2195](#) (Fed. Cir. Dec. 22, 2022) (CH-0752-20-0601-I-1): The court denied the agency's motion to dismiss Mr. Obot's petition for review for lack of jurisdiction and instead transferred his mixed-case appeal to the U.S. District Court for the Northern District of Ohio pursuant to 28 U.S.C. § 1631.

Thurman v. U.S. Postal Service, No. [2022-2196](#) (Fed. Cir. Dec. 22, 2022) (AT-0752-17-0162-I-1): The court transferred this matter to the U.S. District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 1631. Even though the Board had declined to consider Mr. Thurman's discrimination claim because it was unduly vague and not raised before the administrative judge, there was no dispute that Mr. Thurman had nonetheless raised a discrimination claim with the Board and wished to pursue that claim on review.